

The CURE

Contract User's Resource for Excellence

The "CURE" is a quarterly newsletter of the State Controller's Office

Volume 8, Issue 1

February 2002

News From The SCO A State Controller's Office Update

? CCIT Meeting

The February CCIT Meeting will be held on Wednesday, February 20th from 9:00 -12:00 in Building 100 at Camp George West. Camp George West is located just East of Golden on Old Golden Road. The address is 15055 So. Golden Road. If you have questions about the meeting or the location, please call the CCU.

An agenda for the upcoming meeting is included on the last page of this issue of the CURE.



Contract Lease Space Database Presentation:

A reminder that Roger Thomte will be demonstrating the Department of Revenue's newly developed Contract Lease Space Database at this month's CCIT meeting. The database is installed on 25 machines and tracks approximately 100 contracts and 70 leases for DOR's contract administrators, contract managers and purchasing delegates. Both programmers responsible for the development of the database will be part of the demonstration and available to answer your questions.

E-MAIL ADDRESS CHANGES

To make sure you do not miss an issue of the CURE or other important state contract information be sure that you keep your e-mail address current by sending changes to Kevin in the SCO CCU at:

kevin.cruise@state.co.us

Central Approvers Names and Numbers

NAME	PHONE #	FAX #
<u>General Support Services – Department of Personnel</u>		
State Controller's Office		
<u>Central Contract Unit:</u>	<u>Phone Number</u>	<u>Fax Number</u>
Phil Holtmann	303-866-3809	303-866-4233
Yvonne Anderson	303-866-2862	303-866-4233
<u>Routing, Distribution and E-mail Updates:</u>		
Kevin Cruise	303-866-2127	303-866-3569
<u>Fiscal Rule Waivers and Statutory Violations:</u>		
John Ivy	303-866-3765	303-866-3569
Human Resource Services		
<u>Personal Services Review Program:</u>		
Joi Simpson	303-866-5496	303-866-2458
State Buildings and Real Estate Programs :		
Carol Lieber (SBREP)	303-866-3158	303-894-7478
Donna Barr (REP)	303-866-4564	303-866-2201
Clark Bolser (REP)	303-866-4759	303-866-2201
Bob Marshall (REP)	303-866-2204	303-866-2201
State Purchasing:		
Kay Kishline	303-866-6181	303-894-7444
Monica Rahman	303-866-6155	303-894-7440
<u>Office of the Attorney General</u>		
Robert Bowers	303-866-5027	303-866-4139
Bea Pagette	303-866-5227	303-866-4139
David Kaye	303-866-5142	303-866-4139

NOTE: You may e-mail any of the above by using the following format: **firstname.lastname@state.co.us**

Personal Services Review Program

By Joi Simpson, DPA/HRS

Waiver of Successive Review of Personal Services Contracts

With the adoption of the Director's Administrative Procedures, Chapter 10, a provision was added that addresses the review of amendments. P-10-6 states, "Any approval granted under this provision remains valid from year to year so long as the department annually certifies that the facts supporting the original approval have not materially changed. Such certification must be made on forms specified by the director and is subject to verification that the requirements of C.R.S. 24-50-503 or 504 continue to be met."

What does "materially changed" mean?

- ? adding additional services, i.e., the original contract is for maintenance and you want to add programming;
- ? changing the original dollar amount, i.e., the original contract is for a total five years (in one year intervals) for \$1 million the contract needs to be modified to add another \$1 million; and,
- ? extensions of the contract beyond the original term of five years are considered material changes.

So what does this mean and how does an agency certify to the facts? We are in the process of developing a one-page certification form specifically for contract modifications. Agencies will be self-certifying to the facts and routing the form with the contract. You must indicate on the CLIN that, "personal services review waived see cert." If this form does not accompany the contract, it will be forwarded to this program for review. If the contract does not need to be routed to other external approvers, agencies need to complete this form and keep it on file.

What do we do since the form is not developed? If you have a modification to a contract that falls within the scope of this provision, send an email to this program with the supporting facts. If the modification falls within the scope of this provision, you will receive an email from this office granting approval. This email needs to be routed with the contract with a note on CLIN that states, "personal services review waived see email".

Personal Services Review Program Moving to HR Administrators

Currently, contract and purchasing administrators have the responsibility of evaluating the impact of personal services contracts on the State's personnel system. This responsibility has been misplaced. To create further efficiencies in the internal review process for agencies, HR Administrators will be assuming the role of reviewing personal services contracts and determining the impact on the personnel system. Agencies should be holding discussions internally to determine how this process will be handled.

Beginning July 1, 2002, agencies are expected to have a process in place and HR Administrators will be required to sign off on the *Certification for Personal Services Agreements* form before being routed to this office. This **is not** an automatic delegation (decentralization) of the review process. This delegation, if found legal, is expected to take place sometime in the future. HR Administrators will work with this office to resolve any problems or issues related to personal services agreements.

This requirement will establish better communication between purchasing, contracting and human resource staff and facilitate a more coordinated effort when it comes to personal services. It will also help HR offices further identify agency needs.

For questions, please contact me at joi.simpson@state.co.us or 303-866-5496.



A Recent Contract Process Change:

Code Review for Capital Construction Projects

By Phil Holtmann, SCO

The State Controller has determined that Plan Review Authorization forms issued to the code review consultants under contract with the State Buildings Program, (C West Code Consultants, Chamberlain Architects, and Stephen Hall Architects), will no longer have to be signed by the State Controller or one of his delegates to be considered valid commitment vouchers. The signatures that will be required on the document are those of the agency principal representative, the Director of State Buildings Program or a delegate, and the consultant. Once these signatures are affixed, the document is considered an approved authorization and the consultant may commence their review in accordance with the terms of the contract. Agencies may continue to encumber funds for the liability created when the form is processed or they may choose to not encumber funds for these commitments.

This change to the approval process for the Plan Review Authorization forms is being implemented for several reasons. All of the consultants are under contract with the State Buildings Program, the scope of services to be provided by the consultant are defined in the contract, the rates for each service are established in the contract, the method of acquiring services is described in the contract, and a standard form is provided for that purpose. In addition, these transactions are typically for small dollar amounts and the risk to the state is minimal.

Key to CURE Abbreviations

Attorney General's Office	AGO
Central Approvers Task Force	CATF
Central Contract Unit	CCU
Colorado Contract Improvement Team	CCIT
Division of Finance and Procurement	DFP
Department of Personnel & Administration	DPA
State Buildings and Real Estate Programs	SBREP
State Controller's Office	SCO
State Purchasing Office	SPO



Required Changes to all Phase I Waived Contracts

By Phil Holtmann, SCO

The State Controller adopted new Fiscal Rules as of December 1, 2001. Fiscal Rule 3-1 and Appendix A and B, the Special Provisions for state contracts, were modified at that time. This change to the Fiscal Rule means that all waived contracts need to be updated to include the appropriate Special Provisions for the contracting entity. There is a separate Special Provision page for both regular and inter-governmental contracts. The new signature page is the same for both Special Provisions.

Agencies with waived contracts are required to include the new Special Provisions in their contracts and delete the old Special Provisions and any independent contractor provisions from the body of the contract, as this provision is now part of the Special Provisions. Once the waived contract has been modified, a copy of the new contract is to be routed to Phil Holtmann, in the SCO.

Please submit your revised waiver contracts to the CCU by June 30, 2002. If there are other changes that need to be made to your waived contracts besides the Special Provisions and the independent contractor language, then this is an opportunity for contract/program managers to make any other appropriate changes. Again, agencies should submit their current waived contract with the changes identified and include a copy of the new revised contract for SCO review.

There are over 150 waived contracts so it will obviously take me a while to review all of them. I want to thank everyone for their patience now and during this process, but as always—first submitted, first reviewed.

AG Notes

New Special Provisions and Contract Amendments

By Robert D. Bowers, Assistant Attorney General

Recently, several contract amendments have crossed my desk with the new Special Provisions attached. In these cases, the amendments contained the standard Order of Precedence clause as follows:

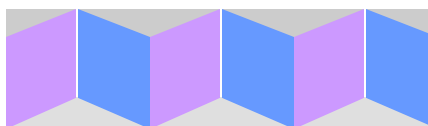
Except for the 'Special Provisions,' in the event of any conflict, inconsistency, variance, or contradiction between the provisions of this amendment and any of the provisions of the original contract, the provisions of this amendment shall in all respects supersede, govern, and control. The 'Special Provisions' shall always be controlling over other provisions in the contract or amendments. The representations in the Special Provisions concerning the absence of bribery or corrupt influences and personal interest of State employees are presently reaffirmed.

Furthermore, these amendments purport to change the underlying contract in very specific ways (not relating to the Special Provisions). Of course, the underlying contracts to be amended use the old Special Provisions. As a result, an issue arises as to which version of the Special Provisions control and is now in effect.

Without expressing an opinion on the above issue, there are at least two easy ways in which to solve problem. First, the agency should consider using the standard *Contract Amendment* form found in Chapter 6, Appendix B (pages 6-97 through 6-98) of the Contract Procedures and Management Manual. This form does not restate the Special Provisions or use the Special Provisions as its signature page. Instead, the form simply refers to the Special Provisions as attached to the underlying contract.

The other simple fix should be used only when the agency insists upon using the new Special Provisions as its signature page in the amendment. In this case, the agency should consider adding a paragraph in the amendment substituting the new version of the Special Provisions for the old. The agency is cautioned, however, in doing so as several clauses contained in the old Special Provisions will be lost (and or modified) by the substitution. If the old Special Provisions contain a clause that you do not want to lose, add that clause to the contract via your amendment.

Good luck and if you have any questions, please feel free to contact me at 303-866-5027.



Suggested Computer Software Piracy language for all State Contracts

By Robert D. Bowers, Assistant Attorney General



In recognition of the evils of computer software piracy, including the damage it does to the State's economy, Governor Owens issued on March 13, 2000, his Executive Order D 002 00, entitled Computer Software Piracy, to: 1) combat the use of unlicensed software in all State agencies, 2) help reduce the economic losses associated with the use of pirated software, and 3) promote proper acquisition and management of software within State agencies. To implement these policies, the Department of Personnel and Administration has been directed to "develop appropriate language for inclusion in State Contracts to prohibit the use of State funds for the acquisition, operation or maintenance of computer software in violation of U.S. copyright laws or applicable licensing restrictions." Id. In addition to the above, each state agency "shall require its contractors and recipients of state financial assistance, including grants and loan guarantee assistance, to certify that they have appropriate systems and controls in place to ensure that state funds are not used to acquire, operate or maintain computer software in violation of U.S. copyright laws or applicable licensing restrictions." Id.

When applying the Governor's requirements to State contracting, it is difficult to imagine any contract that falls outside the scope of the Executive Order. For example, even the simplest contract for the purchase of goods and/or services will, in all likelihood, involve the operation of computer software (i.e. The Contractor will probably use a computer to prepare the billing statement. As the preparation of a billing statement is usually within the compensable scope of work, state funding will have been used to "operate" software. If the Contractor acquires, operates (i.e. uses), or maintain computer software in any way in the performance of the state contract, then arguably, the Executive Order applies. Emphasis Added.).

For this reason, and in pursuant to the Governor's directive, the following clause has been developed (with the help and advice of numerous people) and approved by the State Controller for inclusion in all state contracts, to wit:

Software Piracy Prohibition

No State or other public funds payable under this Contract shall be used for the acquisition, operation or maintenance of computer software in violation of United States copyright laws or applicable licensing restrictions. The Contractor hereby certifies that, for the term of this Contract and any extensions, the Contractor has in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that the Contractor is in violation of this paragraph, the State may exercise any remedy available at law or equity or under this Contract, including, without limitation, immediate termination of the Contract and any remedy consistent with United States copyright laws or applicable licensing restrictions.

Although not currently required by Fiscal Rule, please be informed that the above clause has been suggested for mandatory inclusion in all state contracts via a modified Fiscal Rule 3-1. Keep an eye open for the next Fiscal Rule hearing. In the meantime, you should consider getting a head start by including the clause in your contracts today. Finally, if you have not read the Governor's Computer Software Piracy policy, please consider doing so. The Executive Order can be found at http://www.state.co.us/gov_dir/govnr_dir/exec_orders/index.htm.

CLARIFICATION OF ATTESTATION REQUIREMENTS

by Robert D. Bowers, Assistant Attorney General

As many of you have pointed out, the instructions in the attestation signature block area of the new Special Provisions do not accurately represent the requirements of this office relating to attestations. This latent ambiguity is found in the parenthetical immediately below the word "Corporations" and seems to require only a corporate seal (without an accompanying attestation signature) or an attestation signature (without a corporate seal). See the current form of the attestation signature block immediately below with the offending word highlighted.

"Corporations:

(A corporate seal **or** attestation is required.)

Attest (Seal) By _____
(Corporate Secretary or Equivalent, or Town/City/County Clerk)"

This office requires an attestation signature **and** a corporate seal (if available) on all contracts, amendment, etc. between the State and For-profit corporations, Not for-profit corporations, towns, cities, counties, and other local governmental units. As indicated in the November 2001, issue of the CURE, the attestation signature and seal are relied upon by the State to show 1) that the signatory has the authority to bind the contracting entity to the terms of the contract and 2) that the signatory is in fact the person who he/she claims to be.

This ambiguous clause will be amended in the next Fiscal Rules hearing to correct the problem. In the meantime (and in this clause only), please interpret the word "or" to mean "and" and try to get both the attesting signature and the corporate seal on your contracts. If you have questions in this regard, please give me a call at 303-866-5027.



On the World Wide Web at :

www.sco.state.co.us/

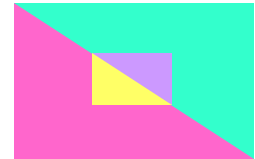
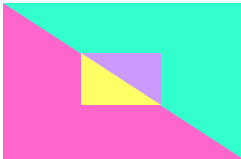
CONTRACT PROCEDURES AND MANAGEMENT
MANUAL

contract/contractprocedures.htm

CURE
cure/cure.htm

PERSONAL SERVICES REVIEW PROGRAM
AND RELATED FORMS

www.state.co.us/hrs/contracts/index.htm



Blanket State Fiscal Rule Waiver

By John Ivy, SCO

Art Barnhart, State Controller, has granted a “blanket” waiver of State Fiscal Rule 3-1 to modify the *Special Provisions* in Inter-Governmental Contracts to include the following language in the Indemnification Provision (#3).

“To the extent authorized by law”

The current language of the Special Provision is as follows:

3. INDEMNIFICATION.

Indemnity: The contractor shall indemnify, save, and hold harmless the State against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.

No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions for the parties, of the Colorado Governmental Immunity Act, Section 24-10-101 et seq. C.R.S. or the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. as applicable, as now or hereafter amended.

The blanket waiver of State Fiscal Rule 3-1 allows the Special Provision to be modified as follows:

3. INDEMNIFICATION.

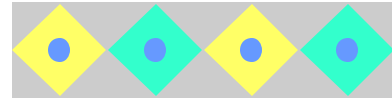
Indemnity: To the extent authorized by law, the contractor shall indemnify, save, and hold harmless the State against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.

No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions for the parties, of the Colorado Governmental Immunity Act, Section 24-10-101 et seq. C.R.S. or the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. as applicable, as now or hereafter amended.

Please note that phrase, “To the extent authorized by law”, was inserted at the beginning of the first paragraph after the word “Indemnity:”

Questions concerning this blanket State Fiscal Rule waiver may be directed to John Ivy. Making this a permanent change to the Special Provisions will be considered when the State Controller holds the next Rule Making Hearing. All required notices and filings will be posted prior to the hearing date, which has not yet been determined.

State Contract Advisory Team (SCAT) Notes:



- At its January meeting, SCAT installed new officers for the next calendar year. Roger Thomte of Revenue was elected as President/Chairman, Lisa Eze of Labor and Employment as Vice President and Maggie Van Cleef as Secretary.
- SCAT would like to thank Bill Austin and Douglas Carroll of State Purchasing for their work in developing the contract users group on Lotus Notes. Currently named "Contract/BOA", the section in Lotus Notes will allow for the posting of model contract language and clauses, discussion threads, and much more. Currently, the various versions of the contract manual rewrite are being posted. SCAT intends to use the contract users group as its main communication format by posting meeting agendas and minutes as well as using the discussion thread.
- The next meeting for SCAT is scheduled for March 12th and will probably be hosted by the Department of Revenue at 1570 Grant Street, Denver. The SCAT Bylaws will be adopted at this meeting.
- SCAT is open to all State of Colorado contracting employees who are interested in sharing contract information, identifying areas for improvement, and recommending improvements to the Central Approvers.



CCIT Meeting

Wednesday, February 20, 2002

Camp George West – Golden, Colorado – Building 100

Agenda

9:00-9:05	Welcome	Phil Holtmann
9:05-10:00	Presentation by the Dept. of Revenue	Roger Thomte
10:00-10:15	BREAK	All
10:15-10:30	Phase I Waiver Update	Phil Holtmann
10:45-11:15	Miscellaneous Issues	Robert Bowers
11:15-11:30	Easement Agreements	Donna Barr
11:30-12:00	Questions	Phil Holtmann